12-3242

To Be Argued By:
BRIAN P. LEAMING

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-3242

UNITED STATES OF AMERICA,
Appellee,

-vs-

JOHN D. ROY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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Statement of Jurisdiction

The district court (Ellen B. Burns, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Judgment entered on August 2, 2012. Appendix ("A")14. On August 9, 2012, the defendant, John Roy, filed a timely notice of appeal pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure. A14. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issues Presented for Review

I. Did the district court err in determining that Roy had three or more qualifying violent felonies to trigger the enhanced penalties under the Armed Career Criminal Act, 18 U.S.C. § 924(e)?

II. Did the district court abuse its discretion and impose a substantively unreasonable sentence in determining that a within-guideline sentence of twenty-five years of imprisonment was sufficient but not greater than necessary to reflect the purposes of a criminal sanction?

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Preliminary Statement

On November 14, 2007, a federal grand jury returned a two-count superseding indictment charging Roy with unlawful possession of firearms and ammunition as a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and 924(e), and the manufacture of and possession with intent to distribute 100 or more marijuana plants, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). Roy's prosecution followed a March 9, 2007,

search warrant of Roy's residence during which Middletown (CT) police officers observed numerous firearms, multiple rounds of ammunition, and firearms related equipment such as holsters, gun cleaning kits, magazines, as well as a sophisticated marijuana grow operation, which included 136 marijuana plants. After a trial by jury, Roy was convicted on both counts of the indictment.

On April 14, 2010, Roy appeared in district court for sentencing. The district court determined that Roy's previous felony convictions qualified him as an Armed Career Criminal ("ACC"), under 18 U.S.C. § 924(e), and sentenced him principally to 300 months of imprisonment. Roy appealed his conviction and sentence. On November 8, 2011, this Court affirmed Roy's conviction by summary order, but remanded the case to the district court for re-sentencing because it had permitted him to represent himself at sentencing without canvassing him adequately.

On July 25, 2012, Roy appeared before the district court for re-sentencing. The district court adopted the factual findings contained in the presentence report, including its determination that Roy was an ACC and its conclusion that he faced a guideline range of 292 to 365 months' imprisonment. The district court imposed a within-guideline sentence of 300 months' imprisonment.

In this appeal, Roy's raises two claims. First, he argues that the district court committed error in finding that he was an ACC. Second, he argues that that his sentence of 300 months of imprisonment was substantively unreasonable. For the following reasons, Roy's claims are without merit.

Statement of the Case

On November 14, 2007, a federal grand jury returned a superseding indictment which charged Roy with possession of firearms and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and possession with intent to distribute and manufacture of 100 or more marijuana plants, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). A4.

On September 24, 2008, the jury returned a verdict of guilty on both counts of the superseding indictment. A8. On April 14, 2010, Roy appeared in district court for sentencing when he received a total effective sentence of 300 months of imprisonment. A11. On April 30, 2010, Roy filed a timely notice of appeal. A11.

On November 8, 2011, this Court affirmed Roy's conviction by summary order, but remanded the case to the district court for a hearing pursuant to *Faretta v. v. California*[2] and resentencing. *United States v. Roy*, 444 Fed. Appx.

[2] 422 U.S. 806 (1975).

480 (2d Cir. Nov. 8, 2011). Prior to sentencing, the district court had granted Roy's motion to proceed *pro se*, but neglected to conduct a hearing to ensure Roy's decision was knowing and voluntary. *Id*. at 484. The mandate followed on November 30, 2011. A13. On December 19, 2011, the district court granted Roy's motion for appointment of counsel. A13.

On July 25, 2012, after a hearing, the district court sentenced Roy principally to 300 months' imprisonment. A14, A149. On August 9, 2012, Roy filed a timely notice of appeal. A14, A152. He is currently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. Offense conduct

In March, 2007, Middletown Police received information from a cooperating witness that Roy was unlawfully possessing firearms at his residence on 60 Church Street. Pre-Sentence Reports ("PSR") ¶¶4-5. The cooperating witness personally observed Roy in possession of multiple firearms, including an AK-47 type assault weapon, handguns, rifles and shotguns. PSR ¶5. Roy had admitted to the cooperating witness that he had previously committed arsons by burning multiple police cars, "knocking over" a gun store, threatening to kill a Middletown Police Officer, and shooting at that same officer.

PSR ¶6. With this information, Middletown Police obtained an arrest warrant for Roy and a search warrant for Roy's residence at 60 Church Street.

On March 9, 2007, Middletown Police executed the search warrant. PSR ¶9. During the search of Roy's bedroom, officers recovered, among other items, three 9 mm handguns and a .223 caliber rifle, a nylon tactical vest with numerous loaded magazines containing .223 and 9mm bullets, a leather shoulder holster which was loaded with 9mm bullets, and a box containing 5.56mm bullets. PSR ¶10. Five additional long guns and ammunition were located in a locked gun safe inside Roy's mother's bedroom. PSR ¶ 11. Officers also discovered a sophisticated marijuana grow operation, which included 136 marijuana plants growing in organic pellets, a watering and lighting system, electric grow lamps, hydroponic pellets, an electronic dehydrator, and cultivated marijuana. PSR ¶¶9, 11.

On the stairs leading to the basement, officers recovered ten .22 caliber shell casings, which were forensically matched to one of the rifles located in the gun safe. PSR ¶12.

Roy's friend, Louis Coccia, testified at trial that, on multiple occasions, he saw Roy in possession of the firearms recovered from 60 Church Street, that Roy knew the combination to the gun safe, and that he helped Roy deliver the safe to Roy's residence. PSR ¶16. Meaghan Hinchey,

Roy's former girlfriend, testified that she also observed Roy in possession of firearms on multiple occasions, that Roy showed her the marijuana grow in the basement, and gave her marijuana. PSR ¶17.

Roy testified in his defense and denied knowingly possessing any firearm or ammunition. PSR ¶19. Roy claimed that either the Middletown Police or his roommate planted the guns in his bedroom. PSR ¶19. Roy acknowledged that marijuana was being grown in the basement, but testified that his mother and her friend were growing the marijuana. PSR ¶19. Roy did admit, however, that he helped construct the mechanized lighting system used to grow the marijuana. PSR ¶19.

B. Pre-Sentence Report

The PSR determined Roy's advisory guideline range to be 292 to 365 months of imprisonment. PSR ¶74. It concluded that the adjusted offense level was 35 and that the criminal history category was VI based on Roy's accumulation of 24 criminal history points. PSR ¶¶31, 49. The PSR also determined that Roy qualified for enhanced penalties under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e), on Count One, and was a career offender, pursuant to U.S.S.G. § 4B1.1, on Count Two. PSR ¶24. In particular, the PSR described the following convictions: breach of peace in 1991 (PSR ¶36); first degree criminal mischief and second degree failure to

appear in 1992 (PSR ¶¶35, 27); third degree burglary (seven counts charged in six separate cases) in 1992 (PSR ¶¶38-43); first degree larceny, first degree criminal mischief, theft of a firearm, and second and third degree arson, all in 1992 (PSR ¶¶38-40); threatening in 1992 (PSR ¶44); third degree burglary, first degree larceny, theft of a firearm and first degree criminal mischief, all in 1993 (PSR ¶¶45-46); third degree burglary in 2004 (PSR ¶47); and interfering with the police in 2007 (PSR ¶48). The government submitted to the district court the evidence supporting those convictions in advance of sentencing, and the court ultimately found that Roy was an ACC. A30-A94.

C. Sentencing Hearing

On July 25, 2012, Roy appeared in the district court for re-sentencing. A14. Both parties submitted sentencing memoranda in advance of the hearing. In his memorandum, Roy disputed the four-level enhancement for the number of firearms involved in the offense. A110. Roy also objected to his classification as an armed career criminal and career offender. A110. Roy argued that none of the third degree burglary convictions qualified as a "violent felonies" in the absence of a plea colloquy transcript wherein he admitted to the necessary factual predicate. Government's Appendix ("GA")6. In his memorandum, Roy made no challenge to the authenticity or the sufficiency of certain documents

proffered by the government, which included charging documents from the prosecuting agency, some of which were unsigned. GA1-GA11. Rather, Roy asserted that the charging documents were only allegations and not admissions by him or findings of fact by the court. GA6.

In addition, Roy argued that his two prior arson convictions were not committed on "occasions different from one another," so that, although the arson convictions categorically qualified as violent felonies, they constituted only one qualifying violent felony. GA11; A122-A123.

In its sentencing memoranda, the government outlined Roy's previous violent felony convictions. GA28-GA32. In support of its argument that Roy was an ACC, the government appended numerous records obtained from Connecticut Superior Court and the Connecticut State's Attorney's Office which confirmed that Roy had been convicted of at least three "generic" burglaries and two "generic" arsons. The government argued that Roy's arson convictions "categorically" qualified as violent felonies and that at least three of his third degree burglary convictions were provable using the modified categorical approach. GA32. The government also countered Roy's claim that the arson convictions could only be considered as one predicate felony as they were not committed on occasions different from one another. GA51-GA52.

To prove that certain of Roy's prior burglary convictions were "generic" burglaries, the government submitted various records, including charging documents, judgments and transcripts, where available. A30-A94. In particular, the government proffered that, on March 26, 1992, Roy was convicted on three separate cases for multiple offenses of third degree burglary, including: (1) third degree burglary, in violation of Conn. Gen. Stat. § 53a-103, which occurred on November 30, 1990 (hereafter "Conviction No. 1")(A30-A36; PSR ¶38); (2) third degree burglary, in violation of Conn. Gen. Stat. § 53a-103, and third degree arson, in violation of Conn. Gen. Stat. § 53a-113a, which occurred on November 28, 1990 (hereafter "Conviction No. 2")(A37-A42; PSR ¶40); and (3) third degree burglary (two counts), in violation of Conn. Gen. Stat. § 53a-103, and second degree arson (two counts), in violation of Conn. Gen. Stat. § 53a-112(a)(1)(B), which occurred on November 27, 1990 (hereafter "Conviction No. 3")(A43-A48; PSR ¶39).

In Conviction No. 1, the government submitted a criminal docket sheet and sentencing judgment, as well as an unsigned copy of a substitute information, which established that Roy pleaded guilty to multiple charges including third degree burglary. A32, A34-A35. More particularly, the information charged that Roy "did enter and remain unlawfully in a building, to

wit: Smith & Bishel's Hardware Store, with intent to commit a crime therein[.]" A34. The second and third counts, to which Roy also pleaded guilty, charged larceny in the third degree and theft of firearms and alleged that Roy stole multiple firearms during the course of the burglary. A34.

In Conviction No. 2, the government submitted a criminal docket sheet, a mittmus judgment and a sentencing judgment, as well as a signed and filed substitute information, which established that Roy pleaded guilty to third degree burglary and third degree arson. A38-A42. More particularly, Roy pleaded guilty to an information which alleged that he did "enter or remain unlawfully in a building, to wit: the Cenacle building, with the intent to commit a crime[.]" A41. Count two alleged that Roy "recklessly cause destruction and damage to a building of another, to wit: the Cenacle building owned by Bristol Savings Bank, by intentionally starting a fire[.]" A41.

In Conviction No. 3, the government submitted a criminal docket sheet and sentencing judgment, as well as an unsigned copy of a substitute information obtained from the State's Attorney's Office, which established that Roy pleaded guilty to multiple charges, including two counts each of third degree burglary and second degree arson. A45-A48. Specifically, Roy pleaded guilty to an information which alleged, in

count one, that Roy "did enter and remain unlawfully in a building, to wit: a 1991 Ford E-150 Club Wagon motor vehicle, with intent to commit a crime[.]" A47. Count two alleged that Roy "with intent to destroy and damage a building, to wit: a 1991 Ford E-150 Club Wagon motor vehicle, did start a fire and such fire was intended to conceal some other criminal act, namely the entry into, tampering with and attempted theft of such vehicle[.]" A47. Count three alleged that Roy "did enter and remain unlawfully in a building, to wit: a 1991 Ford Aerostar Wagon motor vehicle, with intent to commit a crime therein[.]" A48. Count four alleged that Roy "with intent to destroy and damage a building, to wit: a 1991 Ford Aerostar Wagon motor vehicle, did start a fire and such fire was intended to conceal some other criminal act, namely, the entry into, tampering with attempted theft of such vehicle[.]" A48.

In addition to the three cases to which Roy pleaded guilty on March 26, 1992, the government submitted a so-called short form information and judgment showing that Roy was convicted on March 31, 1992, following a guilty plea on March 26, 1992, to third degree burglary, in violation of Conn. Gen. Stat. § 53a-103 (hereafter "Conviction No. 4"). A51. Unlike Conviction Nos. 1, 2 and 3, the information contains no description of the offense other than a reference to the name of the offense, the date of

the offense and the statute violated. A49-A52; PSR ¶42.[3]

The government also submitted a short form information and judgment showing that Roy was convicted on March 4, 1992, of third degree burglary, in violation of Conn. Gen. Stat. § 53a-103, which occurred on November 17-19, 1990 (hereafter "Conviction No. 5")(A53-A57; PSR ¶41).

As to another of his prior third degree burglary convictions ("Conviction No. 6"), A60, PSR ¶45, Roy was convicted after trial, and the government submitted to the district court a criminal docket sheet, an unsigned substitute information, judgment, and a transcript excerpt of the jury charge. A60-A78. Count one of the information alleged that Roy "did enter and remain unlawfully in a building, to wit: Teddy's Gun Shop, with intent to commit a crime therein and . . . while unlawfully remaining, [was] armed with deadly weapons[.]" A63. Although Roy was charged in count one with first degree burglary, the jury convicted him of the lesser included offense of third degree burglary. A60, A77. In charging the jury, the judge had in-

[3] The PSR reports that the underlying offense for Conviction No. 4 occurred on February 28, 1991. PSR ¶42. This date does not appear to be correct as the Superior Court information reveals the date of offense as September 13, 1990. A51.

structed that: "a person is guilty of burglary in the third degree when he enters unlawfully in a building with intent to commit a crime therein. Therefore, there are two elements: entering a building unlawfully and, two, intending to commit a crime in that building. The first element is that the defendant entered a building unlawfully. The word 'enter' has the ordinary meaning; the word 'building' has the ordinary meaning." A75.

Finally, the government submitted a short-form information, judgment and plea transcript, to show that, on May 26, 2004, Roy was convicted of attempted third degree burglary, in violation of Conn. Gen. Stat. §§ 53a-49 and 53a-103, which occurred on February 11, 2004 (hereafter "Conviction No. 7"). A80-A93; PSR ¶47. The information charged Roy with attempt to commit burglary in the third degree, but did not specify the location where he unlawfully entered. A80. Roy's guilty plea was offered pursuant to *Alford v. North Carolina*,[4] A84, so that Roy did not admit to any facts proffered by the government (which included the allegation that Roy unlawfully attempted to enter a business at night). A87.

After addressing the ACC issue, the government advocated in its sentencing memorandum that, based on the factors in 18 U.S.C. § 3553(a),

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[4] 400 U.S. 21 (1970).

the district court should impose a sentence within the sentencing guideline range of 292 to 365 months' imprisonment. GA46. In support of its position, the government highlighted the seriousness of the offense conduct and Roy's extensive criminal history, including convictions for numerous serious and dangerous felonies, as well as his conviction for threatening to kill a police officer, and his propensity to acquire, possess and use firearms. GA42-GA45. The government further argued that Roy's conduct demonstrated a propensity for violence, so that there was a need to protect the community. GA43-GA44. Roy, the government argued, had not in any way been deterred from repeating his criminal behavior despite lengthy terms of incarceration and had continued to demonstrate an unwillingness to abide by the law. GA44.

At the sentencing hearing, Roy advanced his principle argument that a plea transcript confirming his admission to the necessary factual predicate is required for the government to sustain its burden of proof on the ACC issue. A113-A114. Roy also raised, for the first time, a claim that the copies of the informations submitted by the government were not "*Shepard*-approved" documents and, therefore, were insufficient to prove a conviction for "generic" burglary. A114, A118; *see Shepard v. United States*, 544 U.S. 13 (2005). In the absence of a transcript of a plea colloquy containing an admission, Roy argued,

the government could not establish that his prior burglary convictions involved burglaries of a structure. A111-A114, A117-A119. Roy also argued that the 1993 trial conviction for third degree burglary did not qualify because the jury charge was confusing in that the judge instructed the jury that "building" should be given its "ordinary meaning." A120. Since the trial judge did not further define "building," Roy argued that there was no way to know how the jury interpreted the word when returning its guilty verdict. A121. And as to the arson convictions, Roy claimed that the government could not establish that they occurred on occasions different from one another so that, at best, the government could prove only one violent felony. Def.'s Br. at 31.

In response, the government argued that three of Roy's prior convictions for third degree burglary were readily provable as violent felonies using the modified categorical approach, that plea transcripts are unnecessary when the guilty pleas related to charging documents specifying that the burglaries were of structures, and that, as to the burglary conviction after trial, the charging document together with the jury charge established that the burglary involved a structure. A128-A133. By instructing the jury to use the "ordinary" meaning for "building," the jury could only have concluded it was a structure. A133.

The government also argued that the arson convictions were categorical violent felonies and that the district court did not need to look beyond the arson statute itself to make that determination. A134. In total, the government argued that it could prove Roy had five qualifying violent felony convictions. A134-A135.

Before imposing sentence, the district court found, over Roy's objection, that the offense involved nine firearms. A141. The court also found that Roy was an ACC, stating, "As to his being an armed career criminal, the . . . record supports that. The convictions that he's had in the state court system . . . support our finding that he was an armed career criminal. This was the basis of our original sentence in this case, and I am sentencing in this case now, on the basis of that finding." A141.

The court adopted the 292-365 month guideline range set forth in the PSR, A144, and reimposed the same guideline sentence of 300 months' imprisonment. A141, A144. In particular, the court sentenced Roy to 240 months' imprisonment on count one and a consecutive 60-month term on count two. A144. The court stated, "I continue to believe that that is the appropriate sentence in this particular case, and I reimpose the same sentence." A141.

When asked by the government, the district court stated that it considered the sentencing

factors of 18 U.S.C. § 3553(a). A144. In response to the government's inquiry, "[does] the Court also find[] the sentence is reasonable and appropriate, and necessary to achieve the purposes of sentencing?," the court stated:

> I found for deterrence of the Defendant, but also deterrence of the general public that this sentence is appropriate, and I am concerned about the severity of the situation where so many firearms were found. Today, we are plagued by the possession and use of firearms. They are very destructive of society. It's a serious offense, and I think that Defendant's affinity for firearms is something that he's going to have to conquer and get over because we cannot have him in possession of firearms in the future or he'll be before me or some other judge again if you do have them.
>
> . . .
>
> The possession of a firearm by someone who's been convicted of a felony is another crime, so that you'll be before some judge on that score. Again, I find that the purposes of sentencing are satisfied by the sentence that I imposed today; that is, the deterrence of the Defendant, general deterrence, considering the gravi-

> ty of the crime and considering the history and characteristics of the Defendant.

A144-A145.

Summary of Argument

I. The district court did not err in finding that Roy's prior criminal convictions included at least three violent felonies, thereby qualifying him as an ACC under 18 U.S.C. § 924(e). There was sufficient evidence presented to the district court to support its finding that Roy had been previously convicted of at least three qualifying burglary and two qualifying arson offenses.

Roy's convictions for arson categorically qualify as two separate violent felonies, as they occurred on occasions different from one another. And he has sustained three prior convictions for "generic" burglary, *i.e.* burglary of a structure, which is also a violent felony under § 924(e). To establish that the prior burglary convictions involved a structure, as opposed to a vehicle, the government provided the district court with *Shepard*-approved documents, including long-form informations, judgments, and jury instructions. Alternatively, this Court can conclude, consistent with its precedent, that Connecticut's third degree burglary statute, like New York's, categorically qualifies as a violent felony under the residual clause of § 924(e)(2)(B)(ii), so that

all seven of Roy's prior burglary convictions would count as ACC qualifiers.

II. The district court's imposition of a 300-month guideline sentence was substantively reasonable. The court appropriately considered all of the statutory factors under 18 U.S.C. § 3553(a) and gave particular weight to the seriousness of the offense conduct, Roy's repeated possession of firearms, the need for both specific and general deterrence, given that previous sentences as long as over ten years had served no deterrent value, and Roy's extensive criminal record, which included multiple prior convictions for arson, burglary, firearms theft and threatening a police officer. Moreover, at trial, Roy perjured himself by suggested that the seized firearms had been planted and by claiming that the marijuana plants had belonged to his mother.

Argument

I. The district court did not err in finding that Roy had three or more qualifying convictions to trigger the enhanced penalties under the ACCA.

A. Relevant facts

The facts pertinent to the consideration of this issue are set forth above in the Statement of Facts and Proceedings Relevant to this Appeal.

B. Governing law and standard of review

Under the ACCA, a person who violates 18 U.S.C. § 922(g) and "has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another" faces a mandatory minimum sentence of fifteen years in prison and a maximum sentence of life in prison. 18 U.S.C. § 924(e)(1). These penalties are significantly higher than for a standard violation of 18 U.S.C. § 922(g), which imposes no mandatory minimum sentence, and sets a maximum term of ten years in prison. *See also* U.S.S.G. § 4B1.4 (establishing an enhanced guideline range for an ACC).

A "violent felony" under the ACCA is any felony that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). To determine whether a prior conviction is a violent felony under § 924(e), courts first employ the categorical approach. "Under this approach, we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction." *Sykes v. United States*, 131 S. Ct. 2267, 2272 (2011) (*quoting James v. United*

States, 550 U.S. 192, 202 (2007)); *see also Taylor v. United States*, 495 U.S. 575, 600-601 (1990).

Under § 924(e)(2)(B)(ii), when determining whether a prior conviction qualifies as a violent felony, courts consider whether the crimes are one of the enumerated crimes expressly listed or "whether the elements of the offense are of the type that would justify its inclusion within the residual provision [*i.e.*, conduct that presents a serious potential risk of physical injury to another], without inquiring into the specific conduct of this particular offender." *James*, 550 U.S. at 202 (brackets added). Section (ii) of the term "violent felony" specifically enumerates "burglary" and "arson" as qualifying violent felonies. "[T]he matter of whether a crime other than one specifically identified as a violent felony in § 924(e)(2)(B)(ii) 'involves conduct that presents a serious potential risk of physical injury to another' is a question to be answered by reference to the general definition of the crime of which the defendant was convicted." *United States v. Andrello*, 9 F. 3d 247, 249-250 (2d Cir. 1993) (quoting *Taylor*, 495 U.S. at 602).

The general categorical inquiry affords a limited exception. In evaluating a conviction under a broad statute that appears to criminalize both predicate and non-predicate conduct under § 924(e), courts may take some steps to determine whether the original conviction involved conduct that would render it an ACC qualifier.

See Taylor, 495 U.S. at 602. This modified categorical approach authorizes the district court, following a jury trial, to look to the "indictment or information and jury instructions" to determine if "the jury necessarily had to find" the defendant guilty of the predicate conduct. *Id.* Similarly, following a case tried without a jury, the sentencing court may scrutinize the "bench-trial judge's formal rulings of law and findings of fact." *Shepard*, 544 U.S. at 20. In cases which are resolved short of trial, the sentencing court may rely on documents such as "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Id.* at 26. In addition, following any type of conviction, the sentencing court can look to case law interpreting the statute to determine if courts have "considerably narrowed [the statute's] application" to criminalize predicate conduct exclusively. *James*, 550 U.S. at 202. "The determinative issue is whether the judicial record of the state conviction established with 'certainty' that the guilty plea 'necessarily admitted elements of the [predicate] offense.'" *United States v. Savage*, 542 F.3d 959, 966 (2d. Cir. 2008) (quoting *Shepard*, 544 U.S. at 25-26).

In order to establish that a conviction is a "violent felony" under the residual provision of

§ 924(e)(2)(B)(ii), the question is whether the crime "presents a serious potential risk of physical injury to another." *Sykes*, 131 S. Ct. at 2237. "The offenses enumerated in § 924(e)(2)(B)(ii) - burglary, extortion, arson, and crimes involving use of explosives - provide guidance in making this determination." *Id*. "For instance, a crime involves the requisite risk when 'the risk posed by [the crime in question] is comparable to that posed by its closest analog among the enumerated offenses.'" *Id*. (quoting *James*, 550 U.S. at 203 (explaining that attempted burglary poses risks akin to that of completed burglary)).

Additionally, the three previous convictions must have been "committed on occasions different from one another[.]" 18 U.S.C. § 924(e)(1). The statute "unambiguously requires that a defendant's three convictions stem from three, separate criminal episodes and does not suggest, much less require, that the criminal acts and prior convictions take place in any particular sequence. . . [and] does not require that a defendant's three criminal acts be punctuated by intervening convictions." *United States v. Mitchell*, 932 F.2d 1027, 1028 (2d Cir. 1991). "[T]wo convictions arise from conduct committed on different occasions if they do not 'stem from the same criminal episode.'" *United States v. Daye*, 571 F.3d 225, 237 (2d Cir. 2009) (quoting *United States v. Rideout*, 3 F.3d 32, 34 (2d Cir. 1993)). "Considerations relevant to this determination

include whether the victims of the two crimes were different, whether the crimes were committed at different locations, and whether the crimes were separated by the passage of time." *Id*; *see also United States v. Hill*, 440 F.3d 292, 297-98 (6th Cir. 2006) (in determining whether convictions arose from separate criminal episodes, the court looks to whether the offenses occurred at different locations, whether the offenses occurred sequentially or distinct in time, and whether it would have been possible for the defendant to cease his criminal conduct after the first offense).

In determining if the prior convictions qualify as different offenses under the statute, the district court is limited to *Shepard*-approved documents, such as the "terms of the charging document." *Kirkland v. United States*, 687 F.3d 878, 886 (7th Cir. 2012). *Accord United States v. Thomas*, 572 F.3d 945, 950–51 (D.C. Cir. 2009) (applying *Shepard* source restriction to the different occasions inquiry); *United States v. Sneed*, 600 F.3d 1326, 1332–33 (11th Cir. 2010) (district court improperly relied on police reports, which are not *Shepard*-approved, in determining if prior convictions were committed on different occasions). The burden of proving that the offenses were committed on different occasions is by a preponderance of the evidence. *Kirkland*, 687 F.3d at 895 (7th Cir. 2012); *United States v.*

Delossantos, 680 F.3d 1217, 1219 (10th Cir. 2012).

Whether crimes were committed on "occasions different from one another," within the meaning of the ACCA, is a question of law subject to *de novo* review. *United States v. Canty* 570 F.3d 1251, 1254-55 (11th Cir. 2009) (citing *United States v. Pope*, 132 F.3d 684, 689 (11th Cir. 1998)) *see also United States v. Tisdale*, 921 F.2d 1095, 1098 (10th Cir. 1990) (application of distinct offenses requirement to particular factual situation is legal determination subject to *de novo* review); *United States v. Letterlough*, 63 F.3d 332, 334 (4th Cir. 1995) (same).

Ordinarily, the issue of whether a prior conviction constitutes a predicate offense under § 924(e) is an issue of law, which this Court also reviews *de novo*. *United States v. Lynch*, 518 F.3d 164, 168 (2d Cir. 2008) (citing *United States v. King*, 325 F.3d 110, 113 (2d Cir. 2003)). A district court's factual findings as to the nature of a qualifying offense is reviewed under a "clear error standard." *United States v. Houman*, 234 F.3d 825, 827 (2d Cir. 2000) (per curiam). As the First Circuit summarized, "[w]e review the determination that a defendant is subject to an ACCA sentencing enhancement *de novo*, but we review the district court's factual findings underlying the determination for clear error." *United States v. Bennett*, 469 F.3d 46, 49 (1st Cir. 2006) (internal citations omitted).

C. Discussion

Roy claims error by the district court in its finding that he had three or more qualifying violent felonies triggering the ACCA's enhanced penalties. As to his two arson convictions, he does not dispute that they qualify categorically as violent felonies, but argues instead that they did not occur on occasions different from one another and, therefore, should only count as one qualifier. Def.'s Br. at 29-31. As to two of his burglary convictions resulting from guilty pleas, he argues that court records obtained from the prosecuting agency are not *Shepard*-approved documents and, even if they were, they would not be sufficient in the absence of an admission by Roy during a plea allocution that the burglary at issue involved a structure. According to Roy, if there was no admission by him during a guilty plea, the charging document alone cannot establish that he pleaded guilty to the necessary facts to prove a conviction of a generic burglary. Def.'s Br. at 18-24. As to his burglary conviction following a jury trial, he claims that the jury instructions were insufficient to narrow the scope of the charge because the trial judge did not specifically define "building" as a structure. Def.'s Br. at 24-26.

Roy's arguments are contrary to prevailing law.

1. Roy's two prior convictions for arson were committed on occasions different from one another.

There is no dispute that arson under Connecticut law is categorically a violent felony. Def.'s Br. at 31. The only dispute is whether the arson offenses were committed on occasions different from one another. Roy was convicted of three counts of arson based on charges that, on November 27, 1990, he intentionally started fires of two separate motor vehicles, A45, A47-A48, and, on November 28, 1990, he intentionally started a fire in the Cenacle Building. A39, A41-A42. All of the arson convictions were attendant to burglary convictions involving the same "buildings" that were the targets of the arsons. A39, A45. As to the two arson and burglary convictions stemming from the events on November 27, 1990, according to the substitute information, Roy and his accomplice entered two separate vehicles at an automobile dealership, with the intent to commit a crime, and intentionally set them on fire.[5] A47-A48.

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[5] As to the two arsons committed at the automobile dealership, although it certainly may be true that they were committed successively at different times and should, therefore, count as two separate violent felonies under § 924(e), the government cannot prove that this was the case. Also, it bears note that Roy had a co-defendant for this crime and that both were charged as aiders and abettors, *see* Conn. Gen. Stat.

Roy argues that the arsons were committed on the same night so the government cannot prove that they were separate criminal episodes. Def.'s Br. at 30. He argues, unconvincingly and incorrectly, that the government's evidence does not establish that he took a "breather" between the criminal episodes. *Id*. Conviction No. 2 alleged that the arson (and burglary) occurred at the "Cenacle building" on "Wadsworth Street" "on or about the 28th day of November 1990." A41. Conviction No. 3 alleged that the arson (and burglary) occurred at "Longworth Carlson Ford, 55 North Main Street" "on the 27th day of November 1990 in the evening hours[.]" A47. There is nothing to suggest that the arsons were part of the same course of criminal conduct. Their only connection is that Roy entered guilty pleas to both charges on the same date. *See Rideout*, 3 F.3d at 33 ("there is no requirement that the predicate offenses be separated by convictions.").

It is evident from the charging documents and judgments that the Cenacle building arson and the car dealership arsons "were committed on occasions different from one another." First, they were committed on different calendar days. Indeed, they were charged in separate cases with different docket numbers. Second, they were committed at two separate and distinct lo-

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§ 53a-8; A47-A48, so that both arsons could even have been committed simultaneously.

cations. Wadsworth Street (Cenacle building) and 55 North Main Street (Ford dealership) are more than two miles apart. GA52 (citing http://www.mapquest.com/.

"After the defendant successfully completed burglarizing one business, he was free to leave. The fact that he chose, instead, to burglarize another business is evidence of his intent to engage in a separate criminal episode." *United States v. Tisdale*, 921 F.2d 1095, 1099 (10th Cir. 1990). In *Tisdale*, the defendant burglarized three businesses, on the same night, within the same shopping mall. *See id.* "The fact each incident occurred inside one enclosed structure does not alter our conclusion that the crimes were committed at different locations." *Id.*; *see also United States v. Richardson*, 230 F.3d 1297, 1298 (11th Cir. 2000) (burglaries need only be successive to be separate criminal episodes). Arsons committed on two different dates, and two miles apart, are sufficiently distinct to allow a defendant a "breather" and the ability to cease criminal activity after completing the first arson. *See Hill*, 440 F.3d at 297-99 (successive burglaries committed on same night at two locations across the street from each other were committed "on occasions different from one another"). Even if the arsons were committed during the course of the same night spanning two calendar days, as Roy claims, they were committed at different locations, at different times and constitute occa-

sions different from one another. Accordingly, both qualify as violent felonies under the ACCA.

Roy also challenges the sufficiency of the documents relied upon by the government in proving the qualification of the arson (and burglary) convictions. In particular, Roy claims that the charging documents proffered by the government were obtained from the prosecuting agency, and not the court, and therefore are not *Shepard* approved documents. *See Shepard*, 544 U.S. at 26 ("the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information"). His argument is unavailing.

Roy does not challenge now, nor did he at the sentencing hearing, the accuracy or authenticity of the documents. Thus, the determinative issue for him is the source of the *Shepard*-approved document, not their reliability. But there was no reason for the district court not to rely on such documents regardless of their source. They are, indeed, the applicable charging documents and, as such, can be relied upon under the modified categorical approach.

This Court's decision in *United States v. Green*, 480 F.3d 627 (2d Cir. 2007), on which Roy relies, reveals the fragility of his argument. Roy claims only records from the court are *Shepard*-

approved, presumably because they are the only reliable evidence of what happened. In *Green*, however, this Court recognized that Certificates of Disposition, a *Shepard*-approved judicial record, are not necessarily reliable as they are prone to human error. *Id*. at 633-634. *Green* remanded the case to the district court to make that determination. Thus, the determinative issue is not the source of the document, but its reliability. When there is no challenge to its reliability, as is here, it may properly be considered by the district court.

2. Roy has three prior convictions for generic burglaries which qualify as violent felonies.

Burglary in the third degree provides, "A person is guilty of burglary in the third degree when he enters or remains unlawfully in a building with intent to commit a crime therein." Conn. Gen. Stat. § 53a-103. The term "building" in this statute is defined as follows:

> in addition to its ordinary meaning, includes any watercraft, aircraft, trailer, sleeping car, railroad car or other structure or vehicle or any building with a valid certificate of occupancy. Where a building consists of separate units, such as, but not limited to separate apartments, offices or rented rooms, any unit not occupied by the actor is, in addition to be-

> ing a part of such building, a separate building.

Conn. Gen. Stat. § 53a-100(a)(1). The statute criminalizes not only the burglaries of structures, but also the burglaries of vehicles, watercrafts and aircrafts. *Id.*

As discussed above, when a state statute criminalizes conduct some of which qualifies as a violent felony and some of which does not, courts may use a "modified" categorical approach permitting examination of sources beyond the mere fact of conviction, such as the indictment, information and jury instructions. *Taylor*, 495 U.S. at 602. In cases which are resolved short of trial, the government may rely upon court documents such as "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard*, 544 U.S. at 26. The modified categorical approach permits "the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary." *Taylor*, at 602. "The determinative issue is whether the judicial record of the state conviction established with 'certainty' that the guilty plea 'necessarily admitted elements of the [pred-

icate] offense.'" *Savage*, 542 F.3d at 964 (quoting *Shepard*, 544 U.S. at 25, 26).

a. Convictions No. 1 and 2 – Third Degree Burglaries on November 28 and November 30, 1990

In Conviction No. 1, the "Substituted and/or Amended Information" alleged that the burglary was of "Smith & Bishel's Hardware Store." A10. The information further alleges in counts two and three that Roy and others, stole assorted firearms from the same hardware store.

In Conviction No. 2, the "Second Substituted and/or Amended Information," alleged that Roy burglarized a structure, the "Cenacle building." A47-A48. The information further described, in count two, that Roy, and his co-defendant, caused damage and destruction of the "Cenacle building owned by Bristol Savings Bank" by intentionally starting a fire.[6]

There is no dispute that if the burglary was of a structure, it is a "generic" burglary and there-

[6] This burglary conviction should not be considered as a separate violent felony if the arson is also determined to be a violent felony. The two crimes were part of the same criminal episode and were not committed on "occasions different from one another." *Rideout*, 3 F.3d at 34. While it is the government's position that arson and burglary both qualify as violent felonies, they should not count as two separate convictions for a violent felony.

fore a violent felony. *See Taylor*, 495 U.S. at 598 ("generic" burglary requires an unlawful entry into, or remaining in, "a building or other structure.") Indeed, Roy does not contest that the substitute information alleged facts "sufficient to constitute a generic burglary." Def.'s Br. at 21.

Roy, and the *Amicus* brief, challenge the government's reliance on copies of the substitute information obtained from the prosecutor's office. Again, Roy makes no claim regarding the authenticity or accuracy of the document, just whether it was properly considered by the district court. Roy and the *Amicus* brief both argue that, even if the substitute information is an acceptable judicial record, it does establish that the conviction was for a generic burglary. Def.'s Br. at 19; *Amicus* Br. at 11.

Roy's challenge relies principally on *Green*, 480 F.3d 627. The statute of which Green was convicted contained thirteen subsections, not all of which would categorically qualify as a "controlled substance offense" under U.S.S.G. 4B1.2(b). *Id.* at 629. The indictment charging Green specified that he possessed "a narcotic with intent to sell it." *Id.* This subsection of N.Y. Penal Law 220.16 would qualify as a "controlled substance offense," but when Green pleaded guilty, he did so to *attempting* to violate N.Y. Penal Law 220.16, which was not charged in the indictment. Thus, it was unclear what statutory subsection Green was *attempting* to

violate. *Id*. at 632. Given the conflict between the indictment and the Certificate of Disposition, and the absence of any plea transcript or judgment, Green argued that the district court erred in relying exclusively on the Certificate of Disposition to prove the statutory subsection. *Id*. On appeal, this Court noted a recent New York appellate case which decided that Certificate of Dispositions may not be reliable as they are prone to human error. *Id*. at 633-634. Because Green was specifically challenging the reliability of the Certificate of Disposition, the Court remanded the case to the district court to conduct further inquiry. *Id*. at 635.

Roy's reliance on *Green* is misplaced. Unlike the statute in *Green*, there are no subsections contained within Connecticut's third degree burglary statute. So, there is no uncertainty as to the offense of conviction. The only question in determining whether a third degree burglary conviction counts as a generic burglary is what type of "building" Roy burglarized. The substitute information, however, confirmed that the burglary was of a structure (hardware store), and there is no claim or evidence to the contrary. Roy does not, and did not before the district court, challenge the accuracy of the substitute information. *Green*, on the other hand, involved conflicting judicial documents and the possibility that the defendant pleaded guilty to a statutory subsection which would not qualify as a "con-

trolled substance offense." There is no uncertainty that Roy was convicted of third degree burglary and that the information charged a burglary of a structure.

To suggest that Roy pleaded to a burglary of something other than the "Smith and Bissel Hardware store" would have required the district court to engage in complete speculation. Roy was charged by a long form information, the purpose of which is to put the defendant on notice of the specific charges. Rather than rely on a statutory cite and description of offense, the prosecuting authority specified the precise location of the burglary. To adopt Roy's argument, the district court could *never* rely on a charging document regardless of the level of specificity because, for a non-generic offense, the court could never know what the defendant was actually admitting. This interpretation of the law is contrary to *Taylor*, *Shepard*, and its progeny. Roy pleaded guilty, in two separate cases, to informations charging him with burglarizing, in one case, a hardware store and, in the other case, a building owned by a bank, so it was certainly proper for the district court to conclude that these third degree burglary convictions involved structures, and not vehicles.

b. Conviction No. 6 – Third Degree Burglary on July 14, 1991

Conviction No. 6 followed a jury trial in state court. A65-A66. Roy was convicted of "Burglary

in the Third Degree," along with other charges, on February 11, 1993. A65-A66. The jury's guilty verdict was for a lesser included offense; the information charged Roy with first degree burglary.[7] A62-A63. This conviction was also proven to involve a structure. There were two sources from which the district court could have readily found that the burglary was of a structure. First, during the jury charge, the state trial court instructed the jury that, to convict on the lesser included offense of third degree burglary, the defendant, "enter[ed] a building unlawfully, and . . . intend[ed] to commit a crime in that building." A75. The trial judge further instructed the jury that the term "building" has "the ordinary meaning." A75. As the parties acknowledge, Conn. Gen. Stat. § 53a-100(a) defines "building:" "*in addition to its ordinary meaning*, includes any watercraft, aircraft, trailer, sleeping car, railroad car or . . . vehicle." The trial judge,

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[7] Under Conn. Gen. Stat. § 53a-101, "A person is guilty of burglary in the first degree when (1) such person enters or remains unlawfully in a building with intent to commit a crime therein and is armed with explosives or a deadly weapon or dangerous instrument, or (2) such person enters or remains unlawfully in a building with intent to commit a crime therein and, in the course of committing the offense, intentionally, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone, or (3) such person enters or remains unlawfully in a dwelling at night with intent to commit a crime therein.

however, limited its instruction of "building" to "its ordinary meaning." The jury was *not* provided with the more expansive instruction under Gen. Stat. § 53a-100(a), which would have included references to vehicles, watercraft and aircraft, so there is no basis to infer that a jury would have construed the word "building" in any way other than its ordinary meaning. "Building" is defined as "a usually roofed and walled structure built for permanent use (as for a dwelling)." *See* http://www.merriamwebster.com/dictionary/building.

Roy argues that the jury did not necessarily find that the burglary was of a structure because the trial judge did not specifically define "building" as a "structure." Def.'s Br. at 24. Roy also argues that, when the trial court instructed the jury on the elements of first degree burglary that "building has its ordinary meaning," it added "which is any specific definition I would need here." A71. This additional language, according to Roy, indicates an "obvious" attempt by the trial court to expand the definition of "building" beyond its ordinary meaning. Def.'s Br. at 24-25.

Roy's argument is meritless. The additional language is simply an explanation to the jury that there is no need for any further instruction than the ordinary meaning of the word. If the trial court intended to give the expansive definition as set forth in the statute, it only had to

read it to the jury. That the trial court did not read the expanded definition leaves no doubt that the jury could only conclude that "building" meant what it ordinarily means, *i.e.*, a structure.

Roy's also asserts that nowhere in the record does the "court state that [Roy] was accused of entering Teddy's Gun Shop," to suggest that the jury was apparently unaware of the charges against the defendant. The jury, of course, was informed of the charges. GA57 ("You are going to have the Information with you.").[8] As already discussed, the information specifically alleged that the building was "Teddy's Gun Shop." A63-A64.[9] The information, in counts two and three

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[8] This portion of the transcript was not submitted to the district court as there was no claim that the jury was not instructed on the specific charges in the information. As Roy now claims there was insufficient evidence that the jury was so informed, the government has moved to supplement the record to include this portion of the transcript. GA56-GA60.

[9] The post-verdict judgment references the filing of the "Third Substituted and/or Amended Information," which according to the trial transcript, was filed on January 19, 1993, just before the jury was charged. A69. A copy of the "Third Substituted and/or Amended Information" could not be located, but from the trial transcript the amendment to the information was made to conform to the evidence. A69. The only amendment was to reflect that the evidence established that the defendant "enter[ed] unlawfully" rather than "unlawfully remain[ed]" in

further described that Roy stole firearms in excess of $10,000 in value from "Teddy's Gun Shop," located on "Route 81" in the "Town of Haddam." A63-A64. Standing alone, the information establishes that the burglary was of a structure. When considered with the jury charge and the jury's finding of guilty, there can be no doubt that Roy was convicted of a "generic burglary."

In summary, the burglary offenses in Convictions Nos. 1, 2, and 6 have all been confirmed by a preponderance of the evidence using *Shepard*-approved records to involve a structure.

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the building. There was no change to the description of the location of the burglary. Accordingly, the Second Substituted and/or Amended Information provides an accurate description of the charge and the location of the burglary, proving that it was of a "structure."

3. Third degree burglary under Connecticut law is categorically a violent felony under the ACCA.[10]

If a statute "involves conduct that presents a serious potential risk of physical injury to another," it categorically qualifies as a violent felony under 18 U.S.C § 924(e). Even before *Sykes* announced the broad standard for offenses to qualify categorically under the residual clause, this Court had held that third degree burglary under New York law did so qualify.

First, in *United States v. Andrello*, 9 F. 3d 247 (2d Cir. 1993), the Court considered whether the crime of attempted burglary in the third degree under New York law constituted a violent felony under the residual clause under 18 U.S.C.

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[10] Roy correctly notes that the government conceded at sentencing that the modified categorical approach was appropriate in determining if third degree burglary qualifies as a violent felony. And, as discussed above, the modified categorical approach does establish Roy's qualification as an ACC. The records of Roy's prior qualifying convictions were sufficient under *Shepard* to confirm that at least three of his burglary convictions were of a structure and therefore qualified as generic burglaries, without reliance on § 924(e)'s residual clause. Should this Court determine, however, that third degree burglary is categorically a violent felony under the residual clause, which the *Amicus Brief* has squarely placed at issue, then Roy has seven qualifying burglary convictions.

§ 924(e). It is important to note that the New York statute for third degree burglary is very similar to Connecticut's statute.[11] Significantly, neither the Connecticut nor the New York statute for third degree burglary limit its definition of burglary by requiring entry into a dwelling or structure, which is necessary to meet the "generic definition" of burglary under the first part of 18 U.S.C. § 924(e)(2)(B)(ii). *See Taylor*, 495 U.S. at 599. Rather, the New York and Connecticut statutes prohibit such entry into watercraft and certain vehicles. *See* N.Y. Penal §§ 140.00(2), 140.20; Conn. Gen. Stat. §§ 53a-100(a)(1), 101. Notwithstanding the statute's inclusion of locations other than structures, this Court still held that attempted third degree burglary under this New York law categorically qualified as a violent

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[11] Under N.Y. Penal § 140.20, "A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein." *Id.* "[I]n addition to its ordinary meaning, ['building'] includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer. Where a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and a part of the main building." N.Y. Penal § 140.00(2).

felony under the § 924(e)'s residual clause. *Andrello*, 9 F.3d at 250-51.

In so ruling the *Andrello* court noted the Supreme Court's guidance in *Taylor* about the dangerous nature of burglary, which "inherently involves risk of injury to persons who may be in or may enter the targeted building during the burglary . . . 'there is a very serious danger to people who might be inadvertently found on the premises. . . [burglary] creates the possibility of violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Andrello*, 9 F. 3d at 249 (quoting *Taylor*, 495 U.S. 585, 588)). The *Andrello* court concluded that "since burglary itself is a crime that inherently involves a risk of personal injury, the crime of attempted burglary under New York law, which requires proof of conduct that would present a serious potential risk of attainment, must be considered a crime that 'involves conduct that presents a serious potential risk of physical injury to another.'" *Id.* at 249-250. Since the Connecticut and New York statutes share all the relevant elements and definitions – and the same inherent risk of personal injury – a conviction under Connecticut's third degree burglary statute should also categorically qualify as a violent felony under the residual clause.

Next, in *United States v. Brown*, 514 F.3d 256, 265 (2d Cir. 2008), this Court held that a

conviction under the same New York statute for third degree burglary, which, again, substantially mirrors the Connecticut statute, qualified as a "crime of violence" under the residual clause of U.S.S.G. § 4B1.2(a)(2). The Court reasoned that the residual clause in 18 U.S.C. § 924(e)(2)(B)(ii) was identical to the residual clause in § 4B1.2(a)(2), requiring a felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Brown*, 514 F.3d at 268. Interestingly, the Court began its analysis by concluding that the third degree burglary statute did *not* categorically fit within the first clause of § 4B1.2(a)(2)'s definition of a crime of violence – i.e. the enumerated crime of burglary - because the definition of buildings in the statute included structures other than "dwellings." *Id.* at 265. The Court, however, explicitly rejected the argument that the broader definition of "building" prevented the statute from qualifying as a crime of violence under the residual clause. *Id.* at 268.

The *Brown* Court instead focused its analysis on the risk of injury inherent in committing the crime of third degree burglary. It noted Congress's view that "burglary is an offense that inherently poses a risk of physical injury to victims, bystanders, and law enforcement personnel." *Brown*, 514 F.3d at 267. *Brown* cited the Supreme Court's description of burglary as having an "inherent potential for harm to persons."

*Id. (*quoting *Taylor*, 495 U.S. at 588). *Brown* also noted the Supreme Court's discussion in *James*, in which it held that attempted burglary of a "structure" categorically qualified as a violent felony under the residual clause because of the possibility of a "face-to-face confrontation between the burglar and a third party – whether an occupant, a police officer, or a bystander." *Id.* at 267 (quoting *James*, 550 U.S. at 203). The Court in *Brown* reasoned, "[W]e can only conclude that third-degree burglary inherently poses that same risk within the meaning of the identically worded residual clause . . ." *Id.* at 268.

Roy and the *Amicus* brief argue that, because Connecticut's statute includes burglaries of cars and boats it cannot categorically qualify as a "generic" burglary. *See* Def.'s Br. at 17; *Amicus* Br. at 9. The government does not disagree. Clearly, both the New York and Connecticut third degree burglary statutes are more broad than the "generic" burglary statute required under the first clause of § 924(e)(2)(B)(ii), and as defined in *Taylor*.

Nonetheless, this was not the analysis used by the Court in *Brown*. Rather, the Court, focusing on the residual clause, analyzed the risk of physical injury to "victims, bystanders, and law enforcement personnel." *Brown*, 514 F.3d at 267. Whatever minimal differences exist between the New York and Connecticut statutes,

they share the same inherently dangerous nature, the same inherent potential for harm to persons. As with the New York statute, violations of the Connecticut statute create the risk of a "face-to-face confrontation between the burglar and a third party – whether an occupant, a police officer, or a bystander," *Id.*, at 267 (quoting *James*, 550 U.S. at 203). Because of this shared inherent risk, *Brown* is directly on point and the Connecticut statute also categorically qualifies under the residual clause as a violent felony.

The *Amicus* brief attempts to distinguish *Brown* on the premise that the New York statute includes only those vehicles "where people sleep or carry on business (so they are likely to be present if not all the time, at many times)." *Amicus* Br. at 16-17. New York Penal § 140.00(2) includes "vehicle or watercraft used in overnight lodging of persons . . . or an inclosed motor truck, or an inclosed motor truck trailer" as part of its definition of "building." *See also People v. Mincione*, 66 N.Y. 2d 995, 997 (1985) (a commercial van used primarily to transport workers, materials and tools "meets the statutory definition of a building"); *People v. Ruiz*, 502 N.Y. 2d 855 (1986) (a van used to transport people and materials to a jobsite qualifies as a building). *Amicus* argues that the difference between the statutes is significant in that Connecticut's definition of "building" is much broader than New York's definition, as it includes burglary of a vehicle which

is neither enclosed, nor used for business purposes. *Amicus* Br. at 16. For example, under Connecticut's law, a person who reaches into a "Volkswagon Beetle" and "grabs a wallet" violates the statute. *Id*. at 17. New York's law, on the other hand, is limited to vehicles such as enclosed trucks and other commercial vehicles which, the *Amicus* argues, involve a greater risk for the potential for violence because these vehicle types are more likely to be occupied. *Id*.

While there are differences in the scope of the two statutes, those differences are not so significant that the potential for violence turns on the make and model of a vehicle, or whether it was being used for business. The potential risk of physical injury is just as great if a burglar opts to grab a wallet from the glove box of a Honda sedan rather than an electrician's commercial van parked next to it, both of which are parked overnight in front of the electrician's home. More to the point, there is no greater risk of violence if a burglar enters a van affixed with a placard advertising a landscaping business rather than a van with no markings at all.

This risk of injury continues to exist when a person unlawfully enters a vehicle with the intent to commit a crime therein. The Eighth Circuit described this potential for injury when it held that attempted theft of a vehicle qualified as a crime of violence under the residual clause of U.S.S.G. § 4B1.2:

> Theft of a vehicle presents a likelihood of confrontation as great, if not greater, than burglary of commercial property, and it adds many of the dangerous elements of escape. The crime begins when a thief enters and appropriates a vehicle, a time when he is likely to encounter a returning driver or passenger, a passerby, or a police officer, any of whom may be intent on stopping the crime in progress . . . [A]n encounter between the thief and such a person carries a serious risk of violent confrontation.

United States v. Sun Bear, 307 F.3d 747, 752-53 (8th Cir. 2002); *see also State v. Rosario*, 118 Conn. App. 389, 984 A. 2d 98, 100 (2009) (third degree burglary conviction after defendant stole a CD case from a vehicle, was confronted by a witness, and was chased down the street by the victims).

Indeed, a recent First Circuit decision recognized that this Court includes these non-generic burglary statutes as categorical crimes of violence. In *United States v. Brown*, 631 F.3d 573 (1st Cir. 2011), the Court recognized a circuit split on whether burglary statutes that include non-dwelling buildings categorically qualify as crimes of violence and cited *Brown*, 514 F.3d at 268-69, for the proposition: "The Second [Circuit has] held that non-residential burglary is *per se*

a "crime of violence" under § 4B1.2(a)(2)." *Brown*, 631 F.3d at 578, n.3.

The Supreme Court's recent decision in *Sykes* confirmed that this Court correctly focused on the risk an offense poses of physical injury in determining whether that offense qualifies as a violent felony under the residual clause. In that case, the Supreme Court ultimately determined that intentional vehicular flight from an officer's command to stop is categorically a violent felony under the residual clause because vehicular flight "presents a serious potential risk of physical injury to another." *Sykes*, 131 S. Ct. at 2273. The Court considered the risks presented by this crime to other drivers, pedestrians, and pursuing officers during the flight, as well as to the arresting officers immediately after the vehicular flight terminated. *See id.* at 2273-2275. This analysis mirrors this Court's consideration of the risks inherent to third degree burglary. *See Andrello*, 9 F. 3d at 249 (burglary "creates the possibility that violent confrontation between the offender and an occupant, caretaker, or some other person comes to investigate.") (quoting *Taylor*, 495 U.S. at 585, 588); *see also Brown*, 514 F.3d at 267 (burglary "is an offense that inherently poses a risk of physical injury to victims, bystanders, and law enforcement personnel."). The Supreme Court, while comparing vehicular flight to other crimes, noted that "Burglary is dangerous because it can end in confron-

tation leading to violence." *Sykes*, 131 S. Ct. at 2273.

The *Amicus* brief incorrectly relies on *Shepard* for the proposition that non-generic burglary does not categorically qualify as a predicate offense under the residual clause. *See Amicus* Br. at 15. The issue the Supreme Court resolved in *Shepard* was evidentiary. Specifically, the Supreme Court held that police reports cannot be used by the government to prove that a burglary conviction was actually a generic burglary. *See Shepard*, 544 U.S. at 26. In other words, *Shepard* only addressed how the government must prove whether a crime qualified under the first clause, the listed crime of generic "burglary," under 18 U.S.C. § 924(e)(2)(B)(ii). It did not address whether non-generic burglaries categorically qualify under the residual clause of the provision; it did not address the residual clause at all. In fact, in resolving this evidentiary issue, *Shepard* cites *Taylor*'s holding that the listed crime of "burglary" in the first clause of 18 U.S.C. § 924(e)(2)(B)(ii) was limited to "generic burglary." *See Shepard*, 544 U.S. at 16-17 (citing *Taylor*, 495 U.S. at 599). *Taylor* explicitly limited its holding to the first clause of 18 U.S.C. § 924(e)(2)(B)(ii), the listed crime of burglary, and left open the question as to whether other burglaries could qualify as predicate offenses under the residual clause. *See Taylor*, 495 U.S. at 600, n.9 ("Our present concern is only to de-

termine what offenses should count as 'burglaries' for enhancement purposes. The government remains free to argue that any offense – including offenses similar to generic burglary – should count towards enhancements as one that 'otherwise involves conduct that presents a serious potential risk of physical injury to another' under § 924(e)(2)(B)(ii)."). This Court answered the question in *Brown* when it held that New York's non-generic third degree burglary statute so qualifies under the residual clause. *See Brown*, 514 F.3d at 265. As such, *Shepard* is inapposite to Roy's case.

Similarly, the *Amicus* brief cites an unpublished summary order from this Court for the incorrect proposition that third degree burglary does not categorically qualify as a crime of violence. *See Amicus* Br. at 19-20. Specifically, in *United States v. Escalera*, 401 Fed. Appx. 571, 573 (2d Cir. Nov. 17, 2010) (unpublished summary order), this Court noted that the definition of building in third degree burglary included the unlawful entry into places not covered by generic burglary, such as watercraft and other vehicles. Therefore, the Court, citing *Brown*, 514 F.3d at 265, held that this conviction covered conduct that fell outside the federally adopted "generic" definition of burglary and thus did not qualify as a predicate conviction. *Id.* The Court in *Escalera*, however, was analyzing this statute only under the first part of § 924(e)(2)(B)(ii), and

not the residual clause. In fact, the *Escalera* opinion cites to page 265 in the *Brown* opinion, which is the citation in *Brown* where the Court acknowledged that the New York third degree burglary statute does not categorically fit within the first clause of § 4B1.2(a)(2)'s definition of a crime of violence because the of its broad definition of "building." *Brown*, 514 F.3d at 265. *Brown*, though, focused on the inherently dangerous nature of the offense and explicitly rejected the argument that the broader definition of "building" prevented the statute from qualifying as a crime of violence under the residual clause. *Id.* at 267-68. *Escalera* does not overrule *Brown*, nor does it stand for any proposition other than that third degree burglary is broader than the generic burglary listed in the first clause of § 4B1.2(a)(2); it does not analyze this offense under the residual clause, as *Brown* and *Andrello* did. As such, Roy's reliance on it is misplaced.

Amicus also relies on the recent district court decision in *United States v. Alvarado*, No. 11-CR-194 (SRU), 2013 WL 662659 (D. Conn. Feb. 25, 2013). In *Alvarado*, the district court addressed the issue of whether the defendant's previous conviction of burglary in the third degree, which involved an unoccupied vehicle, qualified as a "violent felony." *Id.* at *2. In *Alvarado*, the government advanced the same argument advocated here, that is, Connecticut's

third degree burglary is categorically a violent felony under the residual clause. The district court rejected the government's argument and held that the defendant's conviction of a burglary of a vehicle was not a violent felony. *Id*. at *6. *Alvarado*, the government submits, was not correctly decided as it misapplied the residual clause and its application to non-generic burglary convictions.

The pivotal issue here is whether non-generic burglary "otherwise poses a serious risk of physical injury." The district court in *Alvarado* concluded its analysis after determining that Connecticut's third degree burglary statute was not a generic burglary offense. *Id*. at *6 ("If the state statute is broader than the federal definition of the crime, step three requires the court to examine court records to determine if the conduct underlying conviction for the offense falls into the federal, generic definition. If, at this step, the underlying conduct does not fall into the generic definition of burglary, the inquiry ends and the crime is not an ACCA predicate offense."). The district court's reasoning, however, does not comport with *Brown*, 514 F.3d 256, and *Andrello*, 9 F.3d 247.

No one disputes that New York's third degree burglary statute is more inclusive than *Taylor's* generic burglary definition. Yet, the Courts in *Brown* and *Andrello* concluded that New York's statute categorically qualifies as a violent felony

(and crime of violence) even though it encompassed non-generic burglary. Although *Alvarado* analyzes the differences between the New York and Connecticut burglary statutes, and ultimately concludes that the Connecticut's law is broader, it never reconciles its decision with the fact that *Brown* and *Andrello* deemed third degree burglary under New York law to be categorically a violent felony under the residual clause. If the reasoning in *Alvarado* had been applied to *Brown* and *Andrello*, the inquiry would have ended when the Court determined that a burglary of an enclosed truck, for example, was not a generic burglary. This reasoning is obviously contrary to *Brown* and *Andrello*, as both cases acknowledged that the residual clause was determinative of whether the applicable New York statute qualified as a violent felony. Moreover, neither *Andrello* nor *Brown* excised part of the statute when it analyzed whether third degree burglary "is a crime that is inherently involves a risk of personal injury," *Brown*, at 268 (quoting *Andrello*, at 249), as the district court did in *Alvarado*.

Alvarado misapplied *Sykes* and incorrectly limited its analysis to whether a burglary of a *vehicle* "poses a serious risk of physical injury." *Id.* at *5. The categorical approach requires a determination of whether "conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk to another."

James, 550 U.S. at 208. By analyzing only one part of the statutory definition of "building" and limiting its analysis to only vehicles, *Alvarado* contravened *James* and the need to view the conduct in the "ordinary case," which, under the statute, includes more than unoccupied vehicles.

Contrary to the district court's assessment in *Alvarado*, the government did not argue that all that must be proven to qualify under the residual cause is that the offense "otherwise poses a serious risk of physical injury." *Id.* at *6. The government's argument in *Alvarado*, and here, is that non-generic burglary "is roughly similar, in kind as well as in degree of risk posed, to the examples [enumerated in § 924(e)(2)(B)(ii)]." *Begay v. United States*, 553 U.S. 137, 143 (2008). Indeed, non-generic burglary is similar in kind and in degree of risk posed as generic burglary such that it is appropriate to consider the residual clause in determining if Connecticut's third degree burglary statute presents a serious risk of physical injury.

Third degree burglary is an inherently dangerous crime that carries serious potential risk of physical injury to others. The Supreme Court's analysis of the residual clause of § 924(e) and this Court's precedent regarding a substantially similar New York statute indicate that convictions under Connecticut's third degree burglary statute categorically qualify as violent felonies.

II. The district court's guideline sentence of 25 years' imprisonment was substantively reasonable.

A. Relevant facts

The facts pertinent to the consideration of this issue are set forth above in the Statement of Facts and Proceedings Relevant to this Appeal.

B. Governing law and standard of review

Under 18 U.S.C. § 3553(a), in determining an incarceration term, a sentencing court should consider: (1) "the nature and circumstances of the offense and history and characteristics of the defendant"; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," (b) to accomplish specific and general deterrence, (c) to protect the public from the defendant, and (d) "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"; (3) the kinds of sentences available; (4) the sentencing range set forth in the guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. *Id.*

Following *United States v. Booker*, 543 U.S. 220 (2005), appellate courts are to review sentences for reasonableness, which amounts to review for "abuse of discretion." *Gall v. United States*, 552 U.S. 586, 591 (2007); *United States v. Cavera*, 550 F.3d 180, 187 (2008) (en banc). This reasonableness review consists of two components: procedural and substantive review. *Cavera*, 550 F.3d at 189.

Substantive review is exceedingly deferential. This Court has stated it will "set aside a district court's substantive determination only in exceptional cases where the trial court's decision 'cannot be located within the range of permissible decisions.'" *Id.* (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). This review is conducted based on the totality of the circumstances. *Cavera*, 550 F.3d at 190. Reviewing courts must look to the individual factors relied on by the sentencing court to determine whether these factors can "bear the weight assigned to [them]." *Id.* at 191. However, in making this determination, appellate courts must remain appropriately deferential to the institutional competence of trial courts in matters of sentencing. *Id.* Finally, this Court neither presumes that a sentence within the guideline range is reasonable nor that a sentence outside this range is unreasonable, but may take the degree of variance from the Guidelines into account when assessing substantive reasonableness. *Id.* at 190. This sys-

tem is intended to achieve the Supreme Court's insistence on "individualized" sentencing, *see Gall*, 552 U.S. at 50; *Cavera*, 550 F.3d at 191, while also ensuring that sentences remain "within the range of permissible decisions," *Cavera*, 550 F.3d at 191.

This deference is appropriate, however, only when a reviewing court determines that the sentencing court has complied with the procedural requirements of the Sentencing Reform Act. *Cavera*, 550 F.3d at 190. Sentencing courts commit procedural error if they fail to calculate the guideline range, erroneously calculate the guidelines rang, treat the guidelines as mandatory, fail to consider the factors required by statute, rest their sentences on clearly erroneous findings of fact, or fail to adequately explain the sentences imposed. *Cavera*, 550 F.3d at 190. These requirements, however, should not become "formulaic or ritualized burdens." *Cavera*, 550 F.3d at 193. This Court thus presumes that a district court has "faithfully discharged [its] duty to consider the statutory factors" in the absence of evidence in the record to the contrary. *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006). Moreover, the level of explanation required for a sentencing court's conclusion depends on the context. A "brief statement of reasons" is sufficient where the parties have only advanced simple arguments, while a lengthier explanation may be required when the parties'

arguments are more complex. *Cavera*, 550 F.3d at 193. Finally, the reason-giving requirement is more pronounced the more the sentencing court departs from the Guidelines or imposes unusual requirements. *Id.* This procedural review, however, must maintain the required level of deference to sentencing courts' decisions and is only intended to ensure that "the sentence resulted from the reasoned exercise of discretion." *Id.*

A sentence is substantively unreasonable only in the "rare case" where the sentence would "damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009). This Court recently likened its substantive review to "the consideration of a motion for a new criminal jury trial, which should be granted only when the jury's verdict was 'manifestly unjust,' and to the determination of intentional torts by state actors, which should be found only if the alleged tort 'shocks the conscience.'" *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010) (quoting *Rigas*, 583 F.3d at 122-23). On review, this Court will set aside only "those outlier sentences that reflect actual abuse of a district court's considerable sentencing discretion." *United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008).

C. Discussion

Roy does not contend that his sentence was procedurally unreasonable. He does not maintain that the district court failed to treat the Guidelines as advisory, failed to consider the applicable guideline range and policy statements, or failed to consider the other § 3553(a) factors. *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005). Rather, his claim is that the sentence imposed was substantively unreasonable because there was no evidence that he was violent, that most of his criminal history occurred while he was a teenager, and that otherwise he has attempted to secure gainful employment despite his criminal past. Def.'s Br. at 31-33.

The district court's sentence in this case, first and foremost, reflected the seriousness of the criminal conduct and Roy's extensive and troubling criminal record. Roy unlawfully possessed numerous firearms, hundreds of rounds of ammunition and actively cultivated and grew marijuana. He was also, as the district court found, an armed career criminal based on his extensive criminal history, to include convictions for multiple burglaries and arsons, as well as for threatening to kill a police officer. As the government argued, and the district court agreed, Roy had a propensity to unlawfully acquire, possess and use firearms and had not been deterred in any way from repeating his criminal behavior. He had convictions not only for burglary and ar-

son, but for stealing guns and threatening a police officer. He served over ten years in prison, was released and committed yet another burglary for which he was sentenced to another two years. Despite his lengthy terms of incarceration, his recent offense conduct demonstrated once again Roy's disregard for, and unwillingness to abide by, the law.

Roy's offense was significantly more serious than the possession of a one firearm. Roy possessed nine firearms, hundreds of rounds of ammunition, and assorted firearm-related equipment. Roy possessed these firearms over a significant period of time, fired these weapons on multiple occasions, and possessed these firearms in a location where he cultivated and distributed marijuana. PSR ¶¶5-19. Roy not only accumulated an arsenal of weapons and ammunition, he did so in the same residence where he cultivated more than 100 marijuana plants. PSR ¶¶9-11.

The PSR also outlined Roy's serious criminal history which resulted in 24 criminal history points, almost twice the amount he needed to qualify for category VI. PSR ¶¶35-47, 49. The PSR revealed Roy's contempt for authority, including the aforementioned threat against a police officer and the fact that he engaged Connecticut State Police in a high speed pursuit. PSR ¶7. And it certainly bears note that Roy perjured himself at trial. His false testimony included his false denials and allegations that the

firearms were "planted" by the police or his roommate and his outrageous claims that the marijuana plants belonged to his mother. PSR ¶¶19, 22.

His 300-month sentence was within the applicable guideline range and reflected a fair and measured consideration of the § 3553(a) factors. The district court did not abuse its discretion and its sentence cannot be considered shockingly high.[12]

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[12] On the last page of his brief, Roy asks that, if this Court agrees with either of his claims, it should remand the case back to a different district judge. He seems to allege, with little explanation, that the district court's "fairness is seriously in doubt." Def.'s Br. at 35. This remedy is not appropriate. The case obviously does not involve any alleged breach of a plea agreement or indeed any impropriety which allegedly occurred before the district court. *See, e.g., United States v. Cossey,* 632 F.3d 82, 89 (2d Cir. 2011) (remanding sentencing to a different district judge where original judge's comments about the defendant's "genetic predisposition to re-offend . . . raised serious concerns over the objectivity of the judge . . ."; *United States v. Griffin*, 510 F.3d 354, 367 (2d Cir. 2007) (remanding case to different district judge where government breached plea agreement). Nothing in the sentencing record has suggested that the district court has been anything other than objective and impartial. The fact that the court imposed the same sentence after remand on the *Faretta* issue simply confirms that it was influenced by the same §

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: June 17, 2013

Respectfully submitted,

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3553(a) factors that were relevant at the first hearing.

Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,728 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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Addendum

18 U.S.C. § 924. Penalties

*** * ***

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section

102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force gainst the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * *

Conn. Gen. Stat. § 53a-103. Burglary in the third degree: Class D felony

(a) A person is guilty of burglary in the third degree when he enters or remains unlawfully in a building with intent to commit a crime therein.

(b) Burglary in the third degree is a class D felony.

Conn. Gen. Stat. § 53a-100. Definitions

(a) The following definitions are applicable to this part: (1) "Building" in addition to its ordinary meaning, includes any watercraft, aircraft, trailer, sleeping car, railroad car or other structure or vehicle or any building with a valid certificate of occupancy. Where a building consists of separate units, such as, but not limited to separate apartments, offices or rented rooms, any unit not occupied by the actor is, in addition to being a part of such building, a separate building; (2) "dwelling" means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present; (3) "night" means the period between thirty minutes after sunset and thirty minutes before sunrise; and (4) "public land" means a state park, state forest or municipal park or any other publicly-owned land that is open to the public for active or passive recreation.

* * *

New York Penal Law § 140.20: Burglary in the third degree

A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein.

New York Penal Law § 140.00: Criminal trespass and burglary; definitions of terms

The following definitions are applicable to this article:

* * *

2. "Building," in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer. Where a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and a part of the main building.

* * *